United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B

Docket No. 75-7555

To be argued by:
Jules L. Smith

P/S

IN THE
United States Court of Appeals
For the Second Circuit

THOMAS C. GANGEMI, as President of the SYRACUSE DRAFTSMEN'S ASSOCIATION,

Appellee,

— v —

GENERAL ELECTRIC COMPANY,

Appellant.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLEE

BLITMAN AND KING
Attorneys for Appellee
Office and Post Office Address
500 Chamber Building
351 South Warren Street
Syracuse, New York 13202
Telephone: (315) 422-7111

Of Counsel:
Charles E. Blitman, Esq.
Jules L. Smith, Esq.

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STATEMENT OF THE ISSUE

Whether the District Court's decision and order compelling arbitration may be reversed?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an action to compel arbitration pursuant to the United States Arbitration Act, 9 U.S.C. §4 and pursuant to the Labor Management Relations Act, §301 [29 U.S.C. §185]. The obligation to arbitrate arises out of a collective bargaining agreement executed by the parties.

II. COURSE OF PROCEEDINGS AND DISPOSITION

This action was commenced on June 5, 1975, when Appellee, Syracuse Draftsmen's Association ["Union"], filed its Notice of Petition, Petition and Exhibits in the Federal District Court, Northern District of New York [A 12-56].* The relief sought was an order compelling arbitration.

On July 16, 1975, the parties presented oral argument to the District Court on both the law and the facts. And, by Memorandum-Decision and Order, filed September 3, 1975, the

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* References in this form are to the pages of the Appendix.

Honorable James T. Foley, District Judge, directed that "arbitration proceed in the manner provided in the Collective Bargaining Agreement . . . ." [Gangemi v. General Electric Company, Docket No. 75-CV-277 (N.D.N.Y. September 3, 1975)] [hereinafter "Gangemi II"] [A 96]. The Company, on or about September 22, 1975, then appealed that order to this Court [A 103].*

It is relevant that the Union originally commenced an action to redress the substantive violations of the Collective Bargaining Agreement [A 1]. However, the District Court, by Memorandum-Decision and Order, filed February 4, 1975, dismissed that action on the grounds, inter alia, that the parties were obligated to arbitrate their disputes [Gangemi v. General Electric Company, Docket No. 74-CV-492 (N.D.N.Y. February 4, 1975)] [hereinafter "Gangemi I"] [A 1].**

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* Thereafter, the Company applied to the District Court and the United States Court of Appeals to stay arbitration pending appeal. By decisions dated October 6, 1975 and November 11, 1975, the Courts respectively denied said motions. However, the Court of Appeals did expedite the appeal.

** Said action was commenced in the Supreme Court of the State of New York, County of Onondaga, on November 14, 1974. The Union was granted a temporary restraining order prohibiting the Company from laying off, displacing or changing the job assignments of certain Company employees pending a hearing on the merits. Said order, however, was vacated on November 15, 1974, pursuant to the application of the Company. Thereafter, the Company removed the action to the Federal District Court, Northern District of New York [A 1].

III. STATEMENT OF FACTS

On July 27, 1973, the Union and the Company entered into a collective bargaining agreement ["Agreement"] governing the terms and conditions of employment of the Union's members [A 18]. The Agreement provides that it would take effect July 30, 1973 and continue in force until August 29, 1976, and from year to year thereafter unless modified or terminated by the parties [A 43; Art. XXVI, §1].

The Agreement also provides for the resolution of disputes through a grievance procedure culminating in binding arbitration [A 21-22; Art. III, §1]. The arbitration procedure, set forth at Article IV [A 23], provides:

> Any individual grievance involving the interpretation and application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement of the Association and the Company as executed by their authorized representatives.
>
> Any individual grievance involving a disciplinary penalty (including discharge) imposed during the term of this Agreement upon an employee having more than one year of continuous service may be submitted to arbitration by either party if it remains unsettled after having been properly and fully processed in accordance with the provisions of Article III. In any such case, the standard to be applied by an arbitrator is that any such penalty shall be imposed only for just cause. In order to arbitrate such a case, the party seeking arbitration shall deliver a written request for arbitration to the other party within 30 days after the final decision of the Company has been given to the Association at Step 3 of the grievance procedure set forth in Article III. A copy of the request shall

be sent to the American Arbitration Association. Thereafter, the case will be processed in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association as amended and then in effect.

The award of an arbitrator upon any grievance subject to arbitration as herein provided shall be final and binding upon all parties to this Agreement, provided that no arbitrator shall have any authority or jurisdiction to add to, detract from, or in any way alter the provisions of this Agreement.

Finally, the Agreement provides, with respect to layoffs, at Article IX [A 26-28]:

1. If it becomes necessary to make a general reduction of force in any department, the employees to be laid off or downgraded first will be selected from among those with less than one (1) year's service in the affected department and classification. If necessary to make further reductions within the department, openings will be created in the other departments by laying off employees from the affected classification who have less than one (1) year's service.

2. If it becomes necessary to make further reductions this Section (Section 2) will be followed.

   A draftsman affected by a lack of work will be able to displace a shorter service draftsman as follows:

   (a) A Draftsman affected by a lack of work will displace the shortest service draftsman within his classification and within his Department.

   (b) The draftsman who is thus displaced will then displace the shortest service draftsman within his classification in the bargaining unit, regardless of Department.

   . . . .

> 4. (d) In selecting employees to be laid off or downgraded, subject to the conditions of Section 1 of this Article, total length of continuous service shall be the major factor determining the employees to be laid off or downgraded from among those having the ability to perform the available work.
>
> Subject to the conditions of Section 1 of this Article, an employee may be permitted to displace a shorter service employee, provided he is qualified to perform the available work. When doubt exists on the part of management as to whether or not an employee is qualified to perform the available work and to displace a shorter service employee, the employee shall be interviewed before a final determination of his qualifications is made.
>
> . . . .
>
> [Emphasis added].

On November 1, 1974, the Company issued 32 lack of work notices and 33 displacement notices to Union members [A 2]. Additionally, the Company informed the Union of its intention to retain seven Union members by excluding them from the layoff and "bumping" procedures contained in Article IX of the Agreement [A 2].

Accordingly, on November 14, 1974, the Union commenced an action seeking to permanently enjoin the Company from proceeding with its planned layoffs [Gangemi I; A 1]. The Company, however, took the position that the Union was obligated to exhaust its contractual remedies, i.e., arbitrate the dispute [A 97]. The District Court carefully analyzed the Agreement, determined that the Company was correct and dismissed the action

on the ground that arbitration of the dispute was mandated by the Agreement [A 1-11].

It is important to note that in Gangemi I, supra, the Company argued that the parties were obligated to arbitrate their disputes. In Gangemi II, the District Court observed:

> The issue of whether the arbitration clause was mandatory or permissive was raised by the parties and in particular by G.E. [the Company] who argued that the petitioner-union would have to attempt arbitration before this Court would have jurisdiction. G.E.'s Memorandum of Law, filed January 2, 1974 (74-CV-492) at p. 11 stated:
>
> > To hold otherwise would render the grievance and arbitration procedures a meaningless device which the plaintiff might or might not choose to follow, at its whim. (emphasis supplied). [A 97].

As a result of the grounds of dismissal of its first action, the Union then sought to arbitrate the dispute. Accordingly, the Union processed a grievance through the grievance procedures of the Agreement [A 21-22; Art. III, §1] and, on or about February 26, 1975, demanded arbitration pursuant to Article IV of the Agreement [A 54]. The grievance and demand posed the issue for arbitration as the District Court had suggested in Gangemi I [A 6].* The issue proposed by the

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* The issue suggested by the District Court in Gangemi I, supra, was:

> [W]hether the super seven draftsmen are specially qualified to perform certain available work, and thus whether G.E.'s determination was correct under the contract. [A 6].

Union was:

> Did the General Electric Company violate Article IX of the G.E.-SDA Collective Bargaining Agreement with respect to the decreasing of forces procedure followed and the simultaneous distribution of layoff and displacement notices distributed on or about November 1, 1974? If so, what shall the remedy be? [A 54].

The Company was dissatisfied with the issue as phrased by the Union and proposed its own issue for arbitration [A 55]. That formulation of the issue, however, was unacceptable to the Union.*

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* The defect in the issues proposed by the Company was that it would not resolve the dispute, i.e. whether the Company was violating Art. IX, §4(d) of the Agreement [A 28] by laying off senior employees although retaining junior employees. The Company's proposed issues were designed to determine whether one named senior employee was qualified to perform the job assignment of a junior employee. Thus, the first issue proposed by the Company was:

> In connection with the November 17, 1974 reduction in force was J. F. Bailey qualified within the terms of Article IX, Section 4(d) of the 1973-1976 G.E.-SDA Agreement to perform the job assigned to E. J. Bognaski?

Although Mr. Bailey may not be qualified to perform Mr. Bognaski's job, another employee senior to Mr. Bognaski may be so qualified. Thus, under the Agreement, the Company should lay off Mr. Bognaski, replace him with the other qualified employee, and also retain Mr. Bailey in his previous job. Yet, the answer to the Company's issue might be to retain Mr. Bognaski and lay off Mr. Bailey, although such action would violate the Agreement.

Additionally, the Company's issues did not encompass its violations of the Agreement in its simultaneous distribution of layoff and displacement notices.

Because of the disagreement on the precise issue to be arbitrated, the Company refused to proceed to arbitration. Accordingly, the Union commenced an action seeking an order compelling arbitration, which the District Court granted [A 96-102].

On the question of the issue for arbitration, the District Court ordered that:

> The issue shall be framed by the arbitrator if so agreed upon or shall be in accord with the issue as discussed at p. 6 of my previous decision entitled Gangemi v. General Electric Co., 74-CV-492, decided February 4, 1975. [A 102].

ARGUMENT

POINT I

THE DISTRICT COURT'S ORDER COMPELLING ARBITRATION WAS CORRECT

Arbitration of disputes concerning collective bargaining agreements must be ordered where: (A) the parties have agreed to submit all questions of the interpretation of their contract to arbitration; and (B) the asserted claim is, on its face, governed by the contract. [See, "Steelworkers Trilogy"--United Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 46 LRRM 2416 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593,

46 LRRM 2423 (1960)]. Since both requisites to arbitration are present in the case at bar, the District Court correctly ordered arbitration.

A. The Parties Agreed to Submit all Questions of the Interpretation of Their Contract to Arbitration.

The arbitration clause herein, Article IV [A 23], provides that:

> Any individual grievance involving the interpretation and application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement of the Association and the Company as executed by their authorized representatives. [Emphasis added].

It is submitted that this clause is an unambiguous agreement to submit all grievances concerning the "interpretation or application" of the Agreement to arbitration. In fact, the arbitration clause herein is somewhat similar to the clause discussed in United Steelworkers v. American Mfg. Co., supra, 363 U.S. 564, 565, 46 LRRM 2414 (1960), providing for arbitration of all disputes "as to the meaning, interpretation and application of the provisions of this agreement." Accordingly, the District Court correctly ordered arbitration of the instant dispute.

A review of the entire arbitration clause and the no-strike clause, Article XXI [A 41-42], clearly demonstrates that, as the District Court intoned, "the arbitration clause

[is] mandatory as its language expressly states." [A 10]. Additionally, the absence of clear exclusionary language in the Agreement further supports the District Court's determination that arbitration is mandatory.

1. A Review of the Arbitration Clause Demonstrates That Arbitration Is Mandatory.

The arbitration clause, contained in Article IV [A 23], is reprinted here for clarity. It provides:

> Any individual grievance involving the interpretation and application of a provision of this Agreement may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement of the Association and the Company as executed by their authorized representatives.
>
> Any individual grievance involving a disciplinary penalty (including discharge) imposed during the term of this Agreement upon an employee having more than one year of continuous service may be submitted to arbitration by either party if it remains unsettled after having been properly and fully processed in accordance with the provisions of Article III. In any such case, the standard to be applied by an arbitrator is that any such penalty shall be imposed only for just cause. In order to arbitrate such a case, the party seeking arbitration shall deliver a written request for arbitration to the other party within 30 days after the final decision of the Company has been given to the Association at Step 3 of the grievance procedure set forth in Article III. A copy of the request shall be sent to the American Arbitration Association. Thereafter, the case will be processed in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association as amended and then in effect.

> The award of an arbitrator upon any grievance subject to arbitration as herein provided shall be final and binding upon all parties to this Agreement, provided that no arbitrator shall have any authority or jurisdiction to add to, detract from, or in any way alter the provisions of this Agreement.

The first paragraph provides for arbitration over all disputes involving the "interpretation and application" of the Agreement, whereas the second paragraph, provides only for arbitration of disciplinary grievances. These paragraphs are, thus, parallel provisions, each clearly providing for mandatory arbitration, but each addressed to the circumstances of the grievances to be arbitrated under each.

Both paragraphs provide that "individual grievances" "may be submitted to arbitration" after having been processed through the grievance procedures of Article III. That is, after complying with the grievance procedures, arbitration can be demanded by the Union, which demand the Company must honor. [See, e.g., United Steelworkers v. American Mfg. Co., supra, 363 U.S. 564, 46 LRRM 2414 (1960)].

The Company, however, although admitting that arbitration is mandatory under the disciplinary clause, asserts that differences in the clauses show that arbitration is not mandatory under the general clause [C 8].* It is submitted that the differences between these clauses clearly do not alter their mandatory natures, and that the Company's admission

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* References in this form are to the pages of the Company's "Brief for Appellant".

is further proof that both clauses are mandatory.

The differences between the clauses concern: who may demand arbitration; what the precise issue to be arbitrated will be; and the time within which arbitration must be demanded. They have nothing to do with whether arbitration is mandatory.

For instance, although any employee may demand arbitration concerning the "interpretation and meaning" of the Agreement under the general clause, only employees "having more than one year of continuous service" may demand arbitration of a disciplinary grievance.

And, whereas the disciplinary arbitration clause designates the issue for arbitration common to all disciplinary grievances--whether the penalty was imposed for just cause--the general clause does not designate the issue; instead, and because the issues will necessarily vary, the general clause provides for agreement as to the precise issue for arbitration.

Finally, because of the costly accumulation of back pay common to disciplinary grievances, the disciplinary arbitration clause requires a written request for arbitration to be served within 30 days after the Company renders its final decision under Step 3 of the grievance procedure. The general clause, however, contains no such time limitations.

It is clear, therefore, that the differences between the general and disciplinary arbitration clauses are a result of the differences between disciplinary grievances and grievances over the "interpretation and application" of the

Agreement. And, those differences do not relate, in any way, to whether arbitration is mandatory or voluntary.

As stated supra, both paragraphs clearly and independently provide for mandatory arbitration of grievances. Additionally, the Company admits that arbitration under the disciplinary clause is mandatory [C 8]. Since both clauses are essentially identical, it is clear that arbitration is also mandatory under the general arbitration clause. The District Court, therefore, correctly ordered arbitration.

Finally, the Company argues that arbitration is excluded because Article IV provides that disputes "may be submitted to arbitration" and because such disputes may be submitted to arbitration only "with prior written mutual agreement."

The Company's position is erroneous since the phrase "may be submitted to arbitration" is designed to give the grievant the option of not proceeding to arbitration, and the phrase "prior written mutual agreement" cannot be used by the Company to frustrate arbitration by a refusal to agree on the precise issue for arbitration.

The phrase "may be submitted to arbitration" has consistently been interpreted by the courts to afford the aggrieved party the option of abandoning its claim. In Bonnot v. Congress of Independent Unions Local 14, 331 F.2d 355, 359, 56 LRRM 2114, 2117 (8th Cir. 1964), the court observed that the purpose of the word "may", was:

> [T]o give an aggrieved party the choice between arbitration or the abandonment of its claim. The presence of this or similar language has not prevented the conclusion that a claim, if pressed, is compulsorily subject to arbitration.

And, in Deaton Truck Line, Inc. v. Local 612, Teamsters, 314 F.2d 418, 422, 51 LRRM 2552, 2554 (5th Cir. 1962), the court also stated:

> Clearly . . . "may" should be construed to give either aggrieved party the option to require arbitration. Steelworkers v. American Mfg. Co., 1960, 363 U.S. 564, 565, n. 1, 80 S.Ct. 1343, 4 L.Ed.2d 1403; International Association of Machinists, AFL-CIO v. Hayes Corp., 5 Cir., 1961, 296 F.2d 238, 241, n. 6.

It is relevant that in the now famous case of United Steelworkers v. American Mfg. Co., supra, 363 U.S. 564, 565, n. 1, 46 LRRM 2614 (1960), the arbitration clause, deemed mandatory, also provided that unresolved disputes "may be submitted" to arbitration.

That the "may" clause herein is mandatory is, in fact, admitted by the Company.* The disciplinary arbitration clause, paragraph 2 of Article IV, also contains the phrase "may be submitted to arbitration." That paragraph provides, in relevant part, that:

> Any individual grievance involving a disciplinary penalty (including discharge) imposed during the term of this Agreement upon an employee

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* The Company has apparently abandoned its claim to the contrary [See, Brief for Appellant, at pg. 19].

> having more than one year of continuous service may be submitted to arbitration by either party if it remains unsettled after having been properly and fully processed in accordance with the provisions of Article III. [Emphasis added].

Yet the Company agrees that this clause provides for mandatory arbitration, but fails to explain the differences between this clause and the general arbitration clause.

In any event, the use of the word "may" does not evince that "clear" and "unambiguous" intention of the parties necessary to exclude a matter from arbitration [See, International Association of Machinists v. General Electric Co., 406 F.2d 1046, 1048, 70 LRRM 2477, 2478-79 (2nd Cir. 1969)]. As stated in Republic Steel Corp. v. Maddox, 379 U.S. 650, 658-659, 58 LRRM 2193, 2196 (1965):

> Use of the permissive "may" does not of itself reveal a clear understanding between the contracting parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation. [Emphasis added].

Thus, even if the use of the word "may" in the Agreement is ambiguous, arbitration must still be ordered.

The Company's argument concerning the phrase "prior mutual written agreement" is also erroneous. The Company's argument is, apparently, that it cannot be compelled to

arbitrate on an issue it has not agreed upon.*

It is submitted that arbitration cannot be avoided by the refusal to agree upon the exact wording of the issue to be arbitrated. In Avon Products, Inc. v. UAW, Local 710, 386 F.2d 651, 67 LRRM 2001, 2004 (8th Cir. 1967), the employer also argued that in the absence of its agreement on the issue, arbitration could not be compelled. The court rejected that argument and in ordering arbitration stated that:

> [O]ne party cannot frustrate the arbitration process by refusing to agree on the precise issue to be submitted to arbitration.

It is submitted, therefore, that in order to enforce the arbitration clause herein, as well as national labor policy, the issue to be arbitrated must be specified by the arbitrator [id.], or by the court [Vacuum Men's Assoc. v. Socony Mobil Oil Co., 369 F.2d 480, 63 LRRM 2037 (2nd Cir. 1966)].

2. A Review of the No-Strike Clause Demonstrates That Arbitration Is Mandatory.

Further evidence that the arbitration clauses herein are mandatory can be found in the no-strike-no-lockout clauses of the Agreement, Article XXI [A 41-42]--the so called quid

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* As demonstrated supra, at pg. 12, the "prior written agreement" phrase is the complement of the "just cause" phrase contained in the disciplinary arbitration paragraph, i.e., they both concern the issue to be arbitrated.

pro quo for arbitration. In Gangemi II, the court observed that:

> [W]hen the Agreement is taken on its face and read as a whole, two other articles lend support to the view that arbitration is mandatory under Article IV. See Blake Construction Co., Inc. v. Laborers' Int. U. of N.A., 511 F.2d 324, 327 (D.C. Cir. 1975). Article XXI -- Strikes and Lockouts -- is the so-called quid pro quo clause of the Agreement which strongly implies that binding grievance and arbitration procedures as provided by Articles III and IV are required and must be resorted to before engaging in the economic warfare of a strike or lockout. Monroe Sander Corporation v. Livingston, 377 F.2d 6, 9 (2d Cir. 1967), cert. denied, 389 U.S. 831 (1967). Thus, even if G.E. were willing to tolerate a strike rather than arbitrate the instant grievances, as it apparently proposes, such a concession does not relieve it of the duty to arbitrate. Globe Seaways, Inc. v. National Marine Eng. Ben. Ass'n., 451 F.2d 1159, 1163 (2d Cir. 1971). When a party asserts that a given grievance is immune from mandatory arbitration and presents justification for a strike, the exclusion must be specific and unmistakable because the consequences might be economic warfare instead of industrial peace which would frustrate the central goal of our national labor policy. Carey v. General Electric Co., 315 F.2d 499 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964). Since there is no dispute that the merit of the grievances here are determinable -- one way or the other -- under the Agreement, Article IX, this potential resolution under arbitration would seem additional reason to confine the dispute to contractual arbitration. [A 100].

The no-strike clause herein provides, in relevant part, that there shall be no strikes, etc.,

> [U]nless and until all of the respective provisions of the successive steps of the grievance procedure set forth in Article III shall have been complied with by the Association or if the matter is submitted to arbitration as provided in Article IV.

Additionally, under Section 2 of Article XXI, the Company agrees that it will not conduct a lock out,

> [U]ntil after all the steps of the negotiating procedure as set forth in Article III have been complied with by the parties, or if the matter is submitted to arbitration as provided in Article IV.

Article IV, the arbitration clause, contain both general arbitration and disciplinary arbitration procedures. Thus, the no-strike clause, by its terms, applies to arbitration under both paragraphs. The no-strike clause is, therefore, as the District Court held, the so-called "quid pro quo" for arbitration herein.*

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* It is also observed that under the general arbitration clause and grievance procedures only the Union may, apparently, demand arbitration. The general arbitration clause provides that any "individual grievance" may be submitted to arbitration after the grievance procedure has been followed. And the grievance procedure makes it clear that only the Union may process grievances [See, e.g. Faultless Division v. Local Lodge No. 2040 IAM, 513 F.2d 987, 88 LRRM 3531 (7th Cir. 1975); Affiliated Food Distributors Inc. v. Local Union No. 229, 483 F.2d 418, 84 LRRM 2043 (3rd Cir. 1973), cert. denied, 415 U.S. 916, 85 LRRM 2465 (1974].

Thus, if the Union does not exercise its option to demand arbitration it has the right, under Article XXI, §1 [A 42], to call a strike, and the Company has the right to conduct a lock out. In this case, however, the Union did demand arbitration, as was its right. The arbitration clause is, therefore, mandatory once arbitration has been demanded by the Union.

The Company's assertion, therefore, that the no-strike clause is not applicable herein is erroneous [C 16]. Additionally, it is submitted that its argument concerning the no-strike clause is irrelevant, because a no-strike clause is not a requisite to mandatory arbitration.

In Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 382, 85 LRRM 2049, 2054-55 (1974), the Supreme Court observed that:

> [A]n arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration yet expressly negate any implied no-strike obligation. [Emphasis added].

As demonstrated supra, regardless of the construction of the no-strike clause herein, the parties did provide for mandatory arbitration of their disputes.* Accordingly, the District Court correctly ordered arbitration.

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* If the Company feels aggrieved because the Union conducted strikes allegedly in violation of the no-strike clause of the Agreement, they should, perhaps, have moved for an injunction and an order compelling arbitration under Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 74 LRRM 2257 (1970). [See the Company's complaints over past strikes at pgs. 17 et seq. of its "Brief for Appellant."]

3. The Absence of Clear Exclusionary Language Further Demonstrates that Arbitration Is Mandatory.

The Company does not rely herein upon any clear or unambiguous language to demonstrate that the instant dispute is not arbitrable. Rather, the Company relies upon a demonstrably strained construction of the Agreement to achieve its result. Accordingly, the Company cannot prevail and arbitration was correctly ordered.

In International Association of Machinists v. General Electric Co., supra, 406 F.2d 1046, 1048, 70 LRRM 2477, 2478-79 (2nd Cir. 1969), this Court observed that:

> To resolve the issue of arbitrability, there is no need to rehearse the applicable law here at length; we have done so in the recent past. See, e.g., IUE v. General Electric Co., 407 F.2d 253 (2d Cir. 1968); ILA v. New York Shipping Ass'n, 403 F.2d 807 (2d Cir. 1968). It is enough to say that the authorities there quoted teach us that it is "national policy" to encourage arbitration of labor disputes, that doubts as to arbitrability should be "resolved in favor of coverage," that language excluding certain disputes from arbitration must be "clear and unambiguous" or "unmistakably clear," and that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." This is an imposing litany for the Company to overcome. [Emphasis added].

The disciplinary arbitration clause, upon which the Company primarily relies, contains no language, "clear",

"unambiguous" or otherwise, that can be read as an exclusion of disputes under the general arbitration clause. The disciplinary clause is clearly not, as the Company suggests, "a broad exclusionary clause" [C 11]; rather, it is a narrow clause addressed to the particular circumstances of a disciplinary grievance. Nor does the Company point to any other language in the Agreement that expressly excludes this dispute from arbitration.

In this regard, it is relevant to note that when the Company has desired to specifically exclude disputes from arbitration, it has done so through "clear and unambiguous" language. For example, see the contract in UAW v. General Electric Co., 474 F.2d 1172, 1177, 82 LRRM 2945, 2949 (6th Cir. 1973), where the Company's agreement provided:

> In addition, and notwithstanding any contrary provision of this Article, no issue shall under any circumstances be subject to arbitration if it pertains or relates in any way to: . . .
> (iv) the assignment of work to, or the performance of work by, persons outside the bargaining unit; . . . . [Emphasis added].

And, in particular, see the arbitration clause in IUE v. General Electric Co., 407 F.2d 253, 257, 70 LRRM 2082, 2085 (2nd Cir. 1968), providing that:

> All requests for arbitration which are not subject to arbitration as a matter of right under the provisions of Section 6 above, are subject only to voluntary arbitration. In particular, it is specifically

> agreed that arbitration requests shall be subject only to voluntary arbitration, by mutual agreement, if they
>
> . . .
>
> (c) Involved claims that an allegedly implied or assumed obligation of this National Agreement has been violated. [Emphasis added].*

The Company herein, however, used no such explicit and/or unambiguous language to exclude this dispute from arbitration. It is submitted that the reason explicit language is not so used is because arbitration under the general arbitration clause is mandatory.

B. The Asserted Claim Is, On Its Face, Governed By the Contract.

Article IV of the Agreement provides for arbitration of "Any individual grievance involving the interpretation and application of a provision of [the] Agreement . . . ."

That this arbitration clause covers the dispute is obvious. The issue that the Union seeks to arbitrate is:

> Did the General Electric Company violate Article IX of the G.E.-SDA Collective Bargaining Agreement with respect to the decreasing of forces procedure followed and the simultaneous distribution of layoff

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* Thus, the Company's assertion, at page 12 of its "Brief for Appellant" that the arbitration clauses herein and in the IUE case are the same, is clearly erroneous.

and displacement notices distributed on or about November 1, 1974? If so, what shall the remedy be? [A 54].

In other words, the dispute concerns the "interpretation" and/or "application" of Article IX of the Agreement.

It is submitted, therefore, that the instant dispute is governed by the Agreement and an order compelling arbitration correctly issued. [See, e.g., United Steelworkers v. American Mfg. Co., supra; International Association of Machinists v. General Electric Co., supra; Gangemi I and Gangemi II, supra].

POINT II

BARGAINING AND ADMINISTRATIVE HISTORIES ARE IRRELEVANT HEREIN

The Company argues that the clear meaning of the arbitration clauses herein are modified by the parties' bargaining and administrative histories. It is submitted that such histories may not be used to modify the otherwise clear language of a collective bargaining agreement. And, in any event, the District Court accepted and reviewed all of the submitted bargaining and administrative histories, but found them insufficient to rebut the presumption of arbitrability.

A. Bargaining and Administrative Histories May Not Be Used to Alter Otherwise Clear Contract Language.

As discussed hereinabove, the arbitration clauses herein clearly provide for mandatory arbitration. As the

District Court in Gangemi I, supra, [A 10] observed:

> [T]he arbitration clause in my opinion will be presumed to be mandatory as its language expressly states. [Emphasis added].

The Company, however, seeks to modify the clear intendment of the Agreement by extraneous evidence. This it may not do.

In Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 558, 61 LRRM 2001, 2003 (2nd Cir. 1965) and in Local 12298, UMW v. Bridgeport Gas Co., 328 F.2d 381, 55 LRRM 2563 (2nd Cir. 1964), this Court indicated that where "the lack of a clear-cut intent to exclude the dispute from arbitration was so plain" arbitration must be summarily ordered. That is, bargaining history cannot be employed to alter the otherwise plain language of the contract.

This is such a case. The Company has admitted that the disciplinary arbitration clause is mandatory. That clause is, in relevant part, identical to the general arbitration clause of the Agreement. Thus, it is plain that mandatory arbitration was contemplated under the general arbitration clause. And, there is totally lacking a "clear-cut intent to exclude" this dispute from arbitration. Bargaining history may not, therefore, be employed to alter what is otherwise plain.

Any other rule would be a dangerous vehicle for the avoidance of arbitration by unnecessarily entangling the courts in labor disputes. [See, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 46 LRRM 2416 (1960)]. As the District

Court so aptly observed in Gangemi II [A 101]:

> The inherent difficulty which a federal court has in deciding questions of arbitrability explains in no small measure the reasons behind the strong federal policy to leave to the industry itself the task of settling its labor disputes, especially when the controversy has its roots in the language of the contract, as here.

Additionally, involving the courts in protracted proceedings over the bargaining history of the parties, especially when the Agreement is clear on its face, will defeat the very purposes of the United States Arbitration Act [9 U.S.C. §4]. Those purposes are to resolve disputes speedily and to avoid the expense and delay of extended court proceedings [Federal Commerce & Nav. Co. v. Kanematsu-Gosho, Ltd., 457 F.2d 387, 389 (2nd Cir. 1972)]. It is submitted, therefore, that when the contract is clear, as in the case at bar, the courts cannot review the parties' bargaining history.

Therefore, the Company's reliance upon Strauss v. Silvercup Bakers, Inc., 353 F.2d 555, 61 LRRM 2001 (2nd Cir. 1965), is misplaced [C 19]. That case did not hold that bargaining history may be employed to alter the plain language of a labor contract; rather, only where the language of the contract is ambiguous may bargaining history be employed to determine if a particular matter is to be excluded from arbitration. Thus, referring to the Court's previous decision in Local 12298, UMW v. Bridgeport Gas Co., supra, the Court observed:

> In that case, the lack of a clear-cut intent to exclude the dispute from arbitration was so plain that we were able to reverse a judgment for the party resisting arbitration with instructions to grant the petition to compel arbitration. [Strauss v. Silvercup Bakeries, Inc., supra, at 558, 61 LRRM at 2003; emphasis added].

In Strauss, however, a "clear cut intent" to avoid arbitration over certain disputes was specifically expressed, thus creating an ambiguity that was resolved by the bargaining history. There, the contract provided for arbitration of all disputes in one article, but specifically excluded arbitration over changes of commission payments in a subsequent article. That subsequent article contained the following phrase:

> In the event the parties are unable to agree [over changes of commission payments], the dispute shall not be subject to the Arbitration Procedure of this Agreement. [Strauss v. Silvercup Bakers, Inc., supra, at 556, 61 LRRM, at 2002; emphasis added].

In the instant case, the Agreement contains no language, explicit or otherwise, excluding this or any other dispute from arbitration. Bargaining history is, therefore, irrelevant.

Similarly, in Independent Petroleum Workers v. American Oil Co., 324 F.2d 903, 54 LRRM 2598 (7th Cir. 1963), affirmed by equally divided court, 379 U.S. 130, 57 LRRM 2512 (1964), an ambiguity was also created because the parties had explicitly

agreed that certain disputes were not arbitrable. This ambiguity was resolved by review of bargaining history.

In the case at bar, however, no such ambiguity exists. Like the contracts in Strauss and Petroleum Workers, the Agreement here explicitly provides for arbitration of all disputes; unlike the contracts in those cases, this Agreement does not specifically exclude any dispute from arbitration. Thus, the bargaining history of the parties is irrelevant and cannot be used to alter the plain meaning of the Agreement--that arbitration is mandatory.

B. Bargaining and Administrative Histories Are Irrelevant Herein.

Regardless of whether the District Court should have rejected bargaining and administrative histories, it did not do so. Rather, the Company submitted all of the bargaining and administrative histories it desired, but the District Court properly found such histories to be non-determinative.*

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* The Company seemingly asserts that a trial on the merits should have been held concerning bargaining and administrative history. The Company, however, never requested such a trial. The Company's request for a trial at this time will only delay the inevitable--arbitration--and raises the question why the Company did not previously request a trial. It is submitted that a trial was not requested because it would not demonstrate that arbitration was only voluntary. [See, e.g., International Association of Machinists v. General Electric Co., supra, 282 F.Supp. 413, 421, 67 LRRM 2817, 2822 (N.D.N.Y. 1968), affirmed, 406 F.2d 1046, 70 LRRM 2477 (2nd Cir. 1969)].

The only bargaining history submitted by the Company were proposals to alter the language of the Agreement [C 13-15]. Those proposals, however, do not demonstrate that any change in the mandatory nature of the arbitration clauses were contemplated. Rather, those proposals were merely to change the language of the Agreement but not its meaning or intent. Thus, the bargaining history is irrelevant.

With respect to the history of the administration of the Agreement, the Company asserts that the Union "recognized that mutual agreement of the parties was a prerequisite to arbitration" [C 17]. The Union never recognized such a claim. For reasons not pertinent herein, the Union never before moved to compel arbitration. Thus, the history of contract administration is also irrelevant.

Finally, the Company asserts that the District Court erred by not considering proferred evidence on the foregoing [C 19]. It is submitted that this assertion is clearly incorrect; rather, the District Court did consider the proferred evidence, but found it non-determinative.

The District Court, in Gangemi II, observed:

> [N]othing has been presented by respondent G.E. which would alter the view expressed [in Gangemi I] that the arbitration clause (Article IV) of the Agreement is mandatory and must be resorted to before any action can be maintained here in this Court. [A 98].

Thus, it is clear that the District Court did consider the proferred evidence, but for reasons set forth, found that the evidence did not rebut the presumption of arbitrability.

In this regard, it is relevant to note the Company's erroneous reliance upon CWA v. New York Telephone Co., 327 F.2d 94, 55 LRRM 2275, 2277 (2nd Cir. 1964) [C 11]. That case did not hold that once bargaining history is presented to the court, the federal presumption of arbitrability evaporates, as the Company would have us believe. Rather, bargaining history is used by the court, when the contract is ambiguous, to determine if the presumption of arbitrability is rebutted.* [See, e.g., Strauss v. Silvercup Bakers, Inc., supra, at 559, 61 LRRM, at 2003, where the court observed that, "The ultimate issue is whether the court can say with positive assurance that the exclusionary clause applies to the dispute to be arbitrated."]

In the case at bar, the District Court thoroughly analyzed the Agreement, reviewed the bargaining and administrative histories, although not required to do so, found that the presumption of arbitrability had not been rebutted, and correctly ordered arbitration [A 96-102].

Thus, it is submitted that the proferred bargaining and administrative histories are non-determinative and, in any

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* Bargaining history is but one of the factors used by the court to make that determintion. [See, Independent Petroleum Workers of America v. American Oil Co., supra, 324 F.2d 903, 907, 54 LRRM 2598 (7th Cir. 1963)].

event, irrelevant. Accordingly, the District Court correctly found that arbitration was mandatory and properly ordered arbitration.

CONCLUSION

For all of the foregoing reasons and authorities, it is respectfully submitted that the order of the District Court compelling arbitration must be affirmed.

DATED: November 24, 1975

Respectfully submitted,

BLITMAN AND KING
Attorneys for Appellee
Office and Post Office Address
500 Chamber Building
351 South Warren Street
Syracuse, New York 13202

Telephone: (315) 422-7111

Of Counsel:

Charles E. Blitman, Esq.
Jules L. Smith, Esq.

Affidavit of Service

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313 Montgomery Street
Syracuse, New York 13202
(315) 422-4805

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